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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 337

PUETT ELECTRICAL STARTING GATE CORPORATION,

Petitioner,

vs.

HARFORD AGRICULTURAL & BREEDERS' ASSOCIATION and UNITED STARTING GATE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Puett Electrical Starting Gate Corporation, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review a decree of that court in the above-entitled case which was entered May 25, 1950 and in which case a petition for rehearing was denied without opinion on June 30, 1950.

Opinions Below

The opinion of the District Court (R. 4) is reported in 88 F. Supp. 360. The opinion of the Circuit Court of Appeals (R. 286) is reported in 182 F. 2d 608.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 25, 1950 (R. 295) and a duly filed petition for rehearing was denied on June 30, 1950 (R. 315). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1) and Rule 38 (5)(b) of the rules of this Court.

Questions Presented

1. Whether the Court of Appeals for the Fourth Circuit has (a) exceeded its powers of appellate review as defined by this Court in non-jury patent infringement actions in substituting its view of the facts in the present case for the findings of fact of the trial court which were supported by substantial evidence without holding that the latter are clearly erroneous; and (b) whether, in so doing, it has evinced a renewed and persistent disregard of the limits of its appellate powers as defined by this Court.

2. Whether Amendment VII of the United States Constitution requires, in the light of modern equity practice as defined by this Court and in view of the present merger of law and equity, that findings of fact by the court of first instance shall not be re-examined on appeal by a Court of Appeals otherwise than according to standards applied to jury verdicts; and whether the Court of Appeals for the Fourth Circuit has violated Amendment VII in this case.

3. Whether Article III, § 1 of the United States Constitution, as well as legislation declaratory of the jurisdiction of the United States courts, limits the jurisdiction on appeal of a court of appeals to the re-examination of questions of fact only to the extent of determining whether there was substantial evidence to support the finding made by the trial court; and whether the Court of Appeals for the Fourth Circuit has violated said Article and legislation in this case.

Statement

Petitioner, Puett Electrical Starting Gate Corporation, plaintiff below, filed suit against respondent, Harford Agricultural & Breeders' Association for patent infringement in the District Court for the District of Maryland; respondent, United Starting Gate Corporation, intervened as a party defendant on behalf of its lessee Harford Agricultural & Breeders' Association. For convenience the petitioner is hereinafter referred to as Puett, and respondents as Harford or United. Puett is a California corporation engaged in manufacturing and leasing electrically-operated stall type gates such as are now used at all major race tracks for starting horse races. United is a recent competitor of Puett in the same field, having been formed and dominated by persons who had prior close and confidential relationships with Puett (R. 15-17, 32, 71-78).

The introduction of the Puett starting gate was one of three factors which revolutionized racing, the other two being the totalizator and the photo-finish camera (R. 55-58). This starting gate is the subject of an earlier (1943) Puett patent, the later Puett improvement patent to Whann now at bar having issued in 1948. For obvious economic reasons, the Puett gate used by the race tracks has not been replaced by this later patented gate, but defendant United having no such economic barrier has used Puett's 1948 patent before Puett has had a chance to use it.

In horse racing, uniformity and reliability of operation of the starting gate are of the essence. The contribution Puett made to the revolutionizing of horse racing was that its gate was uniformly reliable in operation. A gate which follows the teachings of the Whann patent has a series of adjacent stalls within a superstructure, each having a pair of front doors and a pair of back doors for confining each horse in its respective stall. Strong springs tend to pull each of the front doors open but, before starting the race, the left front door of each stall is held closed by an energized electromagnet acting on a pivoted armature or keeper which, in turn, is linked to a metal bar extending at

an angle from the door, functioning essentially as a lever. The right front door is held closed by a simple latch such as an overlapping plate on an edge of the left door. Importantly as an improvement, the electromagnet is mounted on the superstructure rather than on the doors; similarly, the linkage between the pivoted armature of the electromagnet and the left front door metal bar or lever is of very simple construction to avoid the possibility of sticking or jamming. Should one horse bolt he will open his own door without releasing the remainder of the doors and horses.

In starting a race, the operator simply presses a button to cut off the electrical current thus de-energizing the magnets; the front doors of all stalls instantly fly open under the action of their respective springs and the race is started.

The district judge held the patent at bar valid and infringed, having been aided by testimonial evidence of defendants' officers and expert witness and models of the patented gate, the infringing gate, and a prior art gate offered in evidence by the defendants. These models were testified to and explained by defendants' expert witness who compared them with the patent in suit. In the light of this evidence and the observation of the witnesses, the court found as a fact that the combination of elements recited in the claims of the Whann patent was incorporated in defendants' starting gate; it also found as a fact that the claims describe defendants' gate and that the structural elements thereof are the full equivalents of plaintiff's patented structure.

The Circuit Court of Appeals summarily reversed these factual findings (although affirming the District Court in several other respects, such as the validity of the patent at bar and the non-infringement of another patent not now in issue). The stated ground of reversal was ". . . we are unable to agree." without pointing out any place wherein these findings of fact by the District Court were not supported by the evidence (R. 293).

Since United intervened as a party defendant, and since Puett and United are for all practical purposes the only

significant manufacturers of stall type gates, there is practically no opportunity for a conflict in decision between circuits.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In reversing factual findings of equivalence and infringement by the District Court.

2. In substituting its own contrary findings of fact for the District Court's findings which were supported by substantial evidence.

3. In substituting findings of fact contrary to the trial court's findings merely because of 'inability to agree' with the latter and without demonstrating that the trial court's findings were clearly erroneous.

4. In exercising a power of appellate review in a non-jury case unwarranted by the rules laid down by this Court and specifically prohibited by F. R. C. P. Rule 52(a), and the United States Constitution.

Reasons for Granting the Writ

SUMMARY:

1. The Court of Appeals has persistently departed so far from the accepted and usual course of judicial proceedings by exceeding its powers of appellate review as to call for an exercise of this Court's power of supervision.

2. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court in overturning findings of fact supported by evidence and by assuming that it has jurisdiction so to do.

3. The Court of Appeals has implicitly decided unsettled important questions of federal and Constitutional law which should be clearly settled by this Court.

I

It is submitted that the Court of Appeals for the Fourth Circuit has fallen into a pattern of error in exercising an unwarranted power of review of findings of fact in non-jury patent infringement actions. A review of its decisions discloses that the Fourth Circuit Court of Appeals professes to recognize the limitations on its power of review of findings of fact, as defined by this Court and as stated in Rule 52(a)[1] of the Rules of Civil Procedure. However, the Rule is actually observed only when the Court's view of the facts coincides with that of the trial court. When that Court reaches a different conclusion as to the facts, it simply substitutes its view for the findings of the trial court, irrespective of any appellate restraint imposed upon it and, in so doing, assumes that it possesses power to re-determine issues of fact—power once exercised by the traditional, but now obsolete, court of equity.

In the exercise of its power of supervision over the administration of justice in the federal courts, it is believed that this Court should review the judgment of the Court of Appeals and reinstate the judgment of the District Court. This Court has ruled that its supervisory authority should be employed to guard against a "subtle undermining" of a fundamental judicial principle in the lower courts. *Thiel* v. *Southern Pac. Co.*, 328 U. S. 217, 225, 66 S. Ct. 984, 988 (1946).[2]

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[1] "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Where the trial judge weighs the evidence more heavily in favor of oral testimony than in favor of inferences from documentary evidence, and his conclusion is a choice between two permissible views, such a finding is not 'clearly erroneous'. United States v. Yellow Cab Co., 338 U. S. 177, 70 S. Ct. 177 (1949).

[2] See also Ballard v. United States, 329 U. S. 187, 67 S. Ct. 261 (1946). Mr. Justice Frankfurter (dissenting) noted, at 329 U. S. 197, that the supervisory power should be exercised to vindicate 'appropriate standards of judicial administration'. Mr. Justice Burton (dissenting) noted, at 329 U. S. 206, that the objectionable practice condemned in the Thiel case was assumed by this Court to still continue. The continuance of a similarly objectionable practice is set forth *infra*.

Consideration of the decisions of the Fourth Circuit Court of Appeals for at least the last fifteen years bears out the conclusion stated above. For example, in *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. 2d 912 (4th Cir. 1935) a finding of fact by the trial court that defendant's devices were not the equivalents[3] of those covered by plaintiff's patent as well as a finding that defendant's employees independently invented[4] the device, were set aside. In so doing the extent of the court's assumed power of factual review is indicated by its fiat[5] that "in an appeal in equity we review the facts as well as the law, . . ."[5a] as well as by its expressions[6] "We must weigh the testimony of the witnesses . . ." and "we cannot credit the testimony".[7] *Judge Soper in his dissenting opinion*[8] *observed that the court was passing on the credibility of witnesses who had already been judged by the trier of the facts.*

In both *Connecticut Paper Products, Inc.* v. *New York Paper Co.*, 127 F. 2d 423 (1942) and *Triumph Explosives, Inc.* v. *Kilgore Mfg. Co.*, 128 F. 2d 444 (1942) this Court of Appeals reversed findings of fact without any announced

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[3] *Id.* p. 920.

[4] *Id.* p. 923.

[5] *Id.* p. 926.

[5a] A 'review' in the sense of re-balancing the weight of the evidence and reversing if its conclusion is *contra* to that of the trial court. Ct. Standard Acc. Ins. Co. v. Simpson, 64 F. 2d 583, 587-588 (4th Cir. 1933) (surety case); also National Manufacture & Stores Corp. v. Whitman, 93 F. 2d 829, at 832, (4th Cir. 1938) (court findings in equitable contract case *reversed* on ground plaintiff's testimony "unworthy of belief").

[6] *Id.* p. 423.

[7] But cf. Occidental Life Ins. Co. v. Thomas, 101 F. 2d 876 (9th Cir. 1939) (concurring opinion insists that a Court of Appeals has no power to weigh the evidence); Hazeltine Research, Inc. v. Admiral Corp., ... F. 2d ...., 86 U. S. P. Q. 289, 290 (7th Cir. July 21, 1950), "At the inception, we are met with the charge frequently made, particularly in patent cases but seldom demonstrated, that the findings of the trial court are entitled to little if any weight. . . . This case is briefed and argued here as though it were a nisi prius proceeding. While this practice is not limited to patent cases, it appears most prevalent in this field of litigation . . . we think it apparent that there has been a tendency to place the review of patent cases in a category different from other cases."

[8] 80 F. 2d 912, at 924, 926.

basis other than a difference of opinion. In the Connecticut Paper case the appellate court concluded that one patent in suit was invalid as an aggregation rather than a combination.[9] The court's approach to the question of review is disclosed in the opinion, e. g., "A very strong bit of evidence against the plaintiff's claim of patentability", "In our opinion, the variations between the two dispensers are of little importance", and, in referring to an element stressed as important in the patent, "We are not so impressed."[10] When considering the Triumph Explosives appeal, the court held two patents invalid as not amounting to inventive[11] improvements. This conclusion was reached by a process of re-evaluating the evidence before the trial court, but *sans* the trial atmosphere. Apparently in this instance, the court vacillated after its first decision, for it is noted in its *published* opinion that it had first announced (in an unpublished opinion) that one patent in suit disclosed an improvement of inventive calibre; however, it then proceeded to reverse itself on the ground that "it failed to give sufficient weight" to a piece of evidence.[12]

Next, in *Lever Bros. Co.* v. *The Proctor & Gamble Mfg. Co.*, 139 F. 2d 633 (4th Cir. 1943), the trial court's findings of fact that defendant's soap making process was not the same nor the equivalent of that claimed in plaintiff's patent were reversed. The trial court's findings had been based on oral and visual evidence.[13] Reviewing and re-weighing the evidence on this issue of fact, the Court of Appeals determined that it could not "agree"[14] with an important scientific witness, whose statements of fact the trial court had adopted; instead it found the accused process "essen-

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[9] Aggregation versus combination is a question of *fact*. Faulkner v. Gibbs, 170 F. 2d 34 (9th Cir. 1948); aff'd. 338 U. S. 267, 70 S. Ct. 25 (1949).

[10] 127 F. 2d 423, at 429.

[11] The issue of invention is also one of fact, *supra* note 9.

[12] 128 F. 2d 444, at 448, 449.

[13] 49 F. Supp. 443, at 460-462.

[14] 139 F. 2d 633, at 642.

tially similar''[15] to the plaintiff's process. Further, it failed to consider limitations in the process claims in the nature of the product produced thereby—limitations and characteristics which the trial judge, *on personal and tangible comparison*[16] *of the accused soap and the patented product,* found as a fact were not present in the allegedly infringing soap.

The Fourth Circuit once again took occasion to ignore the scope of review defined in Rule 52(a) in the case of *Binney & Smith Co.* v. *United Carbon Co.,* 125 F. 2d 255 (1942).[17] The District Court [18] had formally found as a fact, *inter alia,*[19] that a product as described in plaintiff's patent claims and defendant's product (pelletized carbon black), though generally similar, had ''recognizable differences . . . such as degree of porosity, degree of purity, and degree of uniformity in size'' and that on this comparison, defendant's product did not infringe. On appeal, this was reversed, the court stating[20] that on the factual question of infringement ''there can be no reasonable doubt'', noting that the accused product was made in small pellets which were smooth, round and flowable, which were porous and friable and of substantially the same size as that of the product claimed. One looks in vain for a basis for

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[15] *Id.* at 643.

[16] 49 F. Supp. 443, at 459. "Samples of both [soaps] were exhibited to the court on the first day of the trial and my personal observation at the time was in entire accord with Dr. Andrews' later expressed opinion."

". . . the production of the thing itself would seem to be the most natural and efficient process of proof". IV Wigmore on Evidence 240 (3rd ed.)

[17] *Reversed,* 317 U. S. 228, 63 S. Ct. 165, on the ground that the claims were invalid because indefinite, without passing on the factual issue of infringement.

[18] 37 F. Supp. 779.

[19] The District Court also concluded that the patent was invalid on the grounds a) it lacked novelty, b) it did not rise to the dignity of invention and c) the claims were too indefinite.

[20] 125 F. 2d 225, at 260.

this reversal, or for any indication that the trier of the facts arrived at his conclusion without some or substantial evidence justifying the finding.

More recently, in *Jordon* v. *Hemphill Co.,* 180 F. 2d 457 (4th Cir. Feb. 1950) this circuit reversed a finding of fact that the plaintiff, in a patent infringement suit, had not publicly used the invention over two years before applying for a patent thereon. The finding had been based on the testimony of two witnesses. The Court of Appeals, without mentioning that its reviewing powers are not plenary, proceeded to re-weigh the testimony of these witnesses and evaluated their credibility, never having seen or heard them. The extent of the powers of factual review it assumes are summed up in such expressions in the opinion as ". . . it would seem fair for us to deduce that the drawing of 1931 was of the machine shipped to Holeproof.[21] . . . Further, it seems probable[22] . . . there is a fairly justifiable inference.[23] . . . It would appear that Hutton had become purposely evasive and was seeking to limit his answers as much as possible."[24]

The case of *Florence-Mayo Nuway Co.* v. *Hardy,* 168 F. 2d 778 (4th Cir. 1948) is significant. Herein, the District Court had dismissed a suit for infringement of the Mayo combination patent on a tobacco-curing barn, holding, *inter alia,* that the improvement did not amount to invention and that the defendants did not infringe. The Court of Appeals (SOPER, *C. J.,* dissenting) *reversed,* finding that the patent disclosed a novel combination which had enjoyed great commercial success, which yielded a heavier, more valuable tobacco, and which had first solved a pressing agricultural problem. The trial court had found as a fact, on conflicting testimonial evidence, that the weight of the evidence led to the conclusion that a superior tobacco was

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[21] *Id.* at p. 463.

[22] *Id.* at p. 463.

[23] *Id.* at p. 464.

[24] *Id.* at p. 464.

not produced thereby. Over the vigorous objection[25] of Judge SOPER, who reminded the majority of their appellate limitations under Rule 52(a), the court in effect made a contrary finding, being much impressed also by evidence of commercial success. But the appellate enthusiasm for the Mayo patent had diminished greatly by June 1950, when the same court had the erstwhile plaintiff, Florence-Mayo Nuway Co., before it as a defendant charged with infringement of a Smith patent on a similar tobacco curing barn.[26] While adhering to its former decision that the Mayo patent was valid, it took this opportunity to warn the defendant not to take "advantage" of the former decision that defendant's patent was a pioneer patent; in fact ". . . the Mayo patent is not entitled to the liberal treatment of a pioneer patent . . . [since] the court was misled . . . into believing that Mayo was the first to solve the problem presented and the first to achieve commercial success".[27] It may be remarked that the Smith patent in suit had been considered by the court in its former decision[28] and had been cursorily discarded, though now the court declared it to be similar[29] to the Mayo patent.

In the case at bar, the Court of Appeals has once again (and for the second time in the space of six months) summarily overturned a trial court's finding of fact—here a finding that the accused starting gate was the equivalent[30] of that covered by the claims of plaintiff's patent 2,435,729 to Whann. This finding had been based not only on the

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[25] *Id.* at pp. 785 and 786.

[26] Smith v. Florence-Mayo Nuway Co., 182 F. 2d 507 (4th Cir. June 2, 1950).

[27] *Id.* at p. 510.

[28] At p. 781.

[29] Note 26, at p. 510.

[30] "A finding of equivalence is a determination of fact. . . . Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. . . . It is not for this Court to even essay an independent evaluation of this evidence." Graver Tank & Mfg. Co. v. Linde Air Products Co., ... U. S. ...., 70 S. Ct. 854, at 857 (May 29, 1950).

trial court's visual observation (R. 8) of defendants' models of the accused starting gate and of a gate representing plaintiff's patent, but the trial court saw defendants' witnesses demonstrate the operation of these models in court (R. 108-123, 152). Also, both defendant United's president (who was thoroughly familiar with the operation and construction of starting gates by virtue of his long occupation as a race track starter) (R. 59-62) and defendants' expert witness (R. 78) reluctantly[31] admitted (R. 33-41, 44-45, 65-71) on direct and cross-examination that *every element* of the claims of plaintiff's patent was found in the accused starting gate.[31a] What is more, defendants had asserted vigorously, in support of one of their numerous alleged defenses, that plaintiff had reframed (R. 29) the claims in its pending patent application after observing defendants' accused gate. In other words, defendants did not seriously contend that the United gate was not covered by the patent in suit but relied on technicalities, which were not sustained by the evidence, to escape liability.

It cannot be doubted that the District Court's findings were based on "substantial evidence" and were not "clearly erroneous".

Yet the Court of Appeals, without even hinting that its power of reviewing findings of fact could be anything but plenary, set aside the finding of infringement merely on the ground that "With this conclusion of the District Court *we are unable to agree*" (R. 293) (Italics supplied). Thus the deliberate conclusions of the trier of the facts—conclusions arrived at after a trial nearly two weeks long—were brushed aside on the basis of but a few hours consideration. The sound reason underlying the legal requirement that an appellate court must not, except for

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[31] The trial court had to warn an officer of defendant United to be "less evasive" in his testimony (R. 76) and to stop "whispering or half-answering" (R. 77); the court also noted that defendants' expert was spending an "inordinate amount of time" in attempting to magnify minor differences between defendants' gate and plaintiff's patent (R. 118-119).

[31a] "In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it." *Id.* at p. 855.

very clear reasons, overturn findings of fact of this class was summed up by Judge LEARNED HAND as ". . . . in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds".[32]

Consequently, it is submitted that not only was the Court of Appeals incorrect in reversing the trial court in the instant case, but its decision was but another extension of its continuing line of erroneous procedure concerning its appellate power—a situation calling for correction by this Court.

II

Petitioner submits that the Court of Appeals exceeded its jurisdiction and violated a right secured to petitioner by Amendment VII[33] of the United States Constitution in that it overturned findings of fact by the trial court—findings supported by substantial evidence and which would have been accepted without question as unassailable if rendered by a jury.[34] It is recognized that a sufficiently narrow meaning can be read into the words of Amendment VII to warrant the conclusion that a *literal*[35] violation has

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[32] United States v. Aluminum Co. of America, 148 F. 2d 416, 433 (2nd Cir. 1945). See also, Justice Jackson's dissenting opinion in Jungersen v. Ostby and Barton Co., 335 U. S. 560, 69 S. Ct. 269 (1949) wherein he comments on the difficulty inherent in evaluating the factual issue of the status of an industrial art in the few hours available to the appellate bench for consideration. Rule 52(a) is particularly applicable in a case where the trial court has had the benefit of the opinion of experts and has witnessed physical demonstrations of a technical nature. Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271, 69 S. Ct. 535 (1949).

[33] ". . . and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, other than according to the rules of the common law."

[34] Petitioner had demanded a jury trial of the issues of fact herein; this demand was withdrawn, both parties agreeing that the judge would be the trier of the facts. See transcript of motion proceedings before Hon. William C. Coleman, D. J. dated June 10, 1949.

[35] It has been recognized that the Constitution is a flexible, living document and is not to be treated as a historical strait jacket. For example, the Commerce clause has been construed to include, in con-

not occurred, but it is urged that the properly broad scope and sense of this protective prohibition of the Constitution demands a re-instatement of the findings of the trial court.

At the present time, law and equity procedure[36] have been merged[37] in the United States courts as the result of a renascent development which reaches back to the founding of the nation. It is contended that the 'rules of the common law' in the appellate review limitation of Amendment VII are now[38] equally applicable to a so-called "equity

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sorance with the necessities of a particular age, forms of commerce not literally understood as such at the time of its adoption. Thus, it includes telegraphic communications (Leloup v. Port of Mobile, 127 U. S. 640); radio broadcasting (Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650); activities of elevator operators, watchmen and janitors in an office-warehouse building (Butler Bros. v. N. L. R. B., 134 F. 2d 981); and the transportation of women for immoral purposes (Hoke v. United States, 227 U. S. 308).

[36] The typical equity trial is the same as a so-called law trial, although without a jury.

[37] See F. R. C. P. Rules 1, 2 (one form of action); 38(b), (d) (jury trial had only by demand and is waived by failure to make demand); 52(a) (court in all non-jury actions to make special findings of fact similar to a verdict). CLARK, "Experience Under the Amendments to the Federal Rules of Civil Procedure"—Rules of Civil Procedure and Judicial Code (1950 rev. ed., West Publ. Co.) at p. 19 ". . . meanwhile law and equity had been united in the federal courts under the new rules of civil procedure".

[38] Galloway v. U. S., 319 U. S. 372, at 390, 63 S. Ct. 1077, at 1087 (1943).

"The [VII] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law of 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were the 'rules of the common law' then prevalent . . . crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries".

Holmes, THE COMMON LAW, "It [the law] is forever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off."

Query: whether "equity" did not similarly develop and change.

Judge Learned Hand in Petterson Lighterage & T. Corp. v. New York Central R. Co., 126 F. 2d 992, 996 (2nd Cir. 1942) rejected

action" and that a court's findings can be re-examined only according to standards applied to jury verdicts. For this Court early recognized that the Constitutional grants and limitations of judicial power forbade appellate overturning of fact findings, whether found by court or jury. In one of its earliest decisions this Court ruled unequivocally that a finding of fact by the court of first instance in an equity action was conclusive upon it, the appellate court. *Wiscart* v. *D'Auchy*[39], 3 Dallas 321 (1796). Therein it was reasoned that the purpose of appellate review is simply to preserve unity of legal principle and that it is not a denial of justice to refuse the opportunity to a litigant to try his case over several times. Importantly, it was noted that the Judiciary Act of 1789 provided that the mode of proof in equity causes as well as in common law actions should be by oral testimony in open court[40]. Consequently, a merger of law and equity procedure, insofar as it affected appellate

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the contention that an appeal in admiralty is a trial de novo, stating " . . . but certainly as to the question before us here, it is not only obsolete, but at war with all modern procedural tendencies which seek to center responsibility for the decision of the facts upon the trial judge. There cannot be the slightest question of the desirability of so doing; that complex of sight and sound, from which we make our conclusions in a courtroom, is in large part eviscerated when reduced to the printed word; and it is significant that the doctrine that an appellate court should review the facts was borrowed from the Civil Law where the testimony was all by deposition. It is a little curious that, although testimony in admiralty has been for so long taken orally in the district courts, recognition of the implication of the change was so long in coming, but procedure is often laggard, and after all, the change began nearly a century ago."

[39] This decision is significant not only because of the nature of the decision but also because of its setting in our legal history and the eminence of Chief Justice Oliver Ellsworth, who delivered the opinion of the court. It is one of the earliest pronouncements on the scope of judicial review as defined by the Constitution and by Congress, given at a time when the memory of the hostility of the people to unlimited review was vivid.

Chief Justice Ellsworth had been a very active participant in the Constitutional Convention, had been the spokesman in the Senate for the Federalists and had presided over the committee which drafted the cornerstone legislation of our judicial system, the Judiciary Act of 1789—8 Encyclopedia Britannica 375 (14th ed.)

[40] *Id*, at 329.

review, was envisaged by Congress and by this Court from the beginning of our judicial system[41].

While subsequent legislation and court rules laid the basis for a gradual divergence[42] of law and equity procedure with the result that some courts felt free to review and re-weigh evidence on appeal in equity actions, this Court refused to agree that appellate limitations existed only if the action before it could be classified as traditional common law[43], or only if the findings of fact emanated from a jury[44]. For example, see *State Farm Mut. Automobile Ins. Co.* v. *Coughran,* 303 U. S. 485, 58 S. Ct. 670 (1938). Therein the Court of Appeals for the Ninth Circuit had undertaken to review the testimony in a jury-waived action in order to 'elucidate the truth.' This procedure was condemned, it being stated: "To review the evidence was beyond the *competency* of the court" (emphasis supplied).

It is axiomatic that a federal court has no jurisdictional power of review unless granted to it by Congress under the

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[41] Apparently this early merger was short-lived. In 1802, testimony in equity causes was permitted to be taken by deposition, in the court's discretion; by 1842 deposition testimony was the rule rather than the exception and continued so until the Equity Rules of 1912. See Blease v. Garlington, 92 U. S. 1 (1875). Thereafter, a process of re-merging law and 'equity' was generally prevalent, though the old practice shadowed and often obscured the change.

[42] *Supra,* note 41. Compare cases cited previously under Argument I herein.

[43] Parsons v. Bedford, 3 Pet. 433 (1830) held that the verdict of a special jury in an action conducted according to the local practice in Louisiana, which was not common law, was conclusive as to the facts (STORY J.).

[44] Saulet v. Shepard, 4 Wall. 502, 507 (1866). "The statement of the evidence made by the Court below is in the nature of a special verdict, and conclusive as to the facts of the case." Dower v. Richards, 151 U. S. 658, 14 S. Ct. 452 (1894) (findings of fact are conclusive on appeal in a jury-waived action from a state court and the Supreme Court has not *jurisdiction* to review the facts).

United States v. Esnault-Pelterie, 303 U. S. 26, 58 S. Ct. 412 (1938) held that this Court must treat facts found by the Court of Claims, without a jury, as equivalent to a jury verdict despite a possible broader jurisdiction under 28 U. S. C. § 288(b) which termed the review an 'appeal'.

Constitution[45]. While there may once have existed a *statutory*[46] basis for a review as to questions of fact in classical equity or maritime actions—a basis founded on the historical distinction between a writ of error and [civil law] appeal—that basis vanished when the distinction was abolished[47]. This abolition was not intended to enlarge the scope of appellate review to findings of fact[48], but rather to confine appellate review to issues of law, to the end that uniformity of legal principle[49] is preserved in the various circuits, with this Court the final arbiter of conflicts. Thus, when a Court of Appeals proceeds as did the Court below, it exceeds its jurisdiction since it lacks statutory or constitutional authority. It not only runs afoul of the prohibition of Amendment VII but it also is limited by Art. III, Sec. 1.

In short, petitioner urges that a trial court's finding is equivalent to a jury's verdict and that Rule 52(a), which has the force of a statute, is declaratory of appellate jurisdiction under the Constitution[50].

Practically speaking, of course, it is apparent that a curtailment in the number of speculative appeals is socially

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[45] "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish". Art. III, Sec. 1.

[46] The trend has been towards narrowing the scope of review rather than towards broadening it. The "Francis Wright", 105 U. S. 381 (1881). The case cited is authority for the proposition that Congress may constitutionally *limit* a review (here in admiralty) to law only; but Amendment VII precludes extending the scope of review beyond its purview.

[47] Act Jan. 31, 1928, ch. 14, sec. 1, 45 Stat. 54 [former Sec. 861a of 28 U. S. C.; omitted from 1948 Revised Judicial Code and repealed by Act June 25, 1948 c. 646, Sec. 39, 62 Stat. 992 as obsolete]. See Reviser's note to 28 U. S. C. Sec. 1291 to effect distinction between writ of error and appeal abolished.

[48] Bengoechea Macias v. de la Torre & Ramirez, 84 F. 2d 894 (1st Cir. 1936); Bonet v. South Porto Rico Sugar Co., 86 F. 2d 279 (1st Cir. 1936).

[49] Wiscart v. D'Auchy, *supra.*

[50] Ilsen and Hone—"Federal Appellate Practice As Affected By The Rules Of Civil Procedure", F. R. C. P. (1947 rev. ed., West Publ. Co.) at pg. 419.

desirable, not only to relieve an unnecessary burden[51] on the judiciary but to minimize the cost of litigation. And it is self-evident that all the courts of appeal ought to apply similar standards of review[52]. That uniformity does not prevail is equally evident from a comparison of the decisions of the various circuits[53] which at times are inconsistent within themselves.

Petitioner respectfully urges that the time has arrived to correct these wanderings from the narrow pathway of permissible review and to re-affirm the limitations thereon inherent in the Constitution. That the time is ripe is indicated by the growing restiveness against continuing acceptance of anachronistic, conflicting standards, having no logical basis. As Judge FRANK has recently stated:[54]

> "A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically a trial judge's finding has far less respect because he is blessed neither with

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[51] *Id.* at p. 424.

[52] In a traditional "law" case no error occurs if the finding is based on substantial evidence, *supra*, note 45, at p. 416. But the principle of Wiscart v. D'Auchy that all appellate review ought to be by the same standards was lost sight of in the intervening years when equity trials were later based almost exclusively on documentary evidence and the peculiar competence of the trial judge to utilize all his sense impressions in arriving at a finding was discarded. But why has the principle been ignored so long—especially since the Equity Rules of 1912 returned equity practice to the revolutionary form of the Judiciary Act of 1789? Perhaps Judge Hand's pithy comment quoted in note 38 provides a clue.

[53] Occidental Life Ins. Co. v. Thomas, 107 F. 2d 876 (9th Cir. 1939); Missouri Pacific Transp. Co. v. George, 114 F. 2d 757 (8th Cir. 1940); Andrew Jergens Co. v. Conner, 125 F. 2d 686 (6th Cir. 1942); Rogers v. Edward L. Burton & Co., 137 F. 2d 284 (10th Cir. 1943); United States v. Aluminum Co. of America, 148 F. 2d 416 (2nd Cir. 1945) court must treat trial judge's findings based on testimony as "unassailable". Contra: Hoeltke v. C. M. Kemp Mfg. Co., 80 F. 2d 912 (4th Cir. 1935).

[54] Orvis v. Higgins, 180 F. 2d 537 (2nd Cir. Feb. 2, 1950).

jurors' inexperience nor administrative officers' expertness."

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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